IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. R.S. (DOB: 6-17-94), Appellant.	)))))))))))	No. 63828-9-I DIVISION ONE UNPUBLISHED FILED: February 16, 2010

Cox, J. — R.S. seeks accelerated review of his manifest injustice disposition. Because the State failed to give appellate counsel of record notice of presentation of the findings and conclusions that the trial court entered while this review was pending, we vacate those written findings and conclusions.[1] But we conclude from our review of the whole record, including the report of proceedings of the disposition hearing and the dispositional report submitted by the juvenile probation counselor, that the manifest injustice disposition was proper in this case. Specifically, we conclude that (1) the reasons supplied by the disposition judge are supported by the record, (2) those reasons clearly and

[1] See State v. Pruitt, 145 Wn. App. 784, 793, 187 P.3d 326 (2008).

convincingly support the conclusion that a disposition within the standard range would constitute a manifest injustice, and (3) the sentence imposed was neither clearly excessive nor clearly too lenient. We affirm.

The State charged R.S. with one count of residential burglary and one count of third degree malicious mischief arising from his participation in an October 2008 residential burglary. He pled guilty to the residential burglary charge in exchange for the State's agreement to dismiss the malicious mischief charge and recommend 20 days of detention for the burglary. The signed plea agreement contains a recitation that R.S. understood that the probation counselor would make a contrary recommendation: 48 to 52 weeks as a manifest injustice disposition.

At the disposition hearing, following the court's acceptance of his plea of guilty to the residential burglary charge, the State recommended the agreed 20 days of detention. As expected, the juvenile probation counselor appeared to explain further the basis for her recommendation of a manifest injustice disposition of 48 to 52 weeks in a Juvenile Rehabilitation Administration (JRA) facility. She had previously submitted to the court a detailed dispositional report to which she referred during the hearing.

Following argument by counsel and a request for comment by R.S., the juvenile court judge imposed a disposition of 48 to 52 weeks with credit for time served. This exceeds the standard range of zero to 30 days in detention, zero to 12 months of community supervision, and zero to 150 hours of community

service.

While the court entered its Order of Disposition on that date, it did not contemporaneously enter any written findings or conclusions.

R.S. appealed. Following service and filing of his Motion for Accelerated Review/Opening Brief of Appellant, the State prepared proposed written findings and conclusions to support the previously entered disposition order. The State presented these findings and conclusions to the trial court for entry without giving any notice to appellate counsel of record. The trial court entered the State's proposed findings and conclusions, which the State then used to supplement the record on appeal.

NOTICE OF PRESENTATION

We first consider the threshold arguments by R.S. regarding the trial court's entry of the State's proposed written findings and conclusions after he sought accelerated review in his opening brief. Simply stated, R.S. argues that we should disregard those findings and conclusions because they were entered without any notice to appellate counsel of record. R.S. also challenges certain provisions of those findings and conclusions and claims that the trial court was required to first seek this court's permission before entering them. We agree with the first argument and need not reach the others.

The juvenile court did not enter written findings and conclusions until after R.S. filed his notice of appeal and opening brief with this court. R.S.'s appellate counsel indicates that he did not receive notice of presentation of written

findings and conclusions from the State.

Where appellate counsel has been appointed and trial counsel has withdrawn, a criminal defendant's trial counsel should still participate in the post-hearing presentation of written findings and conclusions.[2] But where "appellate counsel has been appointed, ***the State should also give that attorney notice of the presentation and provide him or her with copies of the proposed findings and conclusions so that appellate counsel can choose whether or not to participate.***"[3]

In State v. Pruitt, we addressed a more complex set of circumstances than those here, illustrating why notice to appellate counsel should be given.[4] There, the trial court made an oral ruling finding the defendant guilty of second degree possession of stolen property.[5] The court did not contemporaneously enter written findings and conclusions.[6] On appeal, the defendant challenged the sufficiency of the evidence and the trial court's failure to enter written findings of fact and conclusions of law.[7]

After Pruitt filed his opening brief and without notice to appellate counsel

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[2] State v. Corbin, 79 Wn. App. 446, 451, 903 P.2d 999 (1995).

[3] Id. (emphasis added).

[4] 145 Wn. App. 784, 187 P.3d 326 (2008).

[5] Id. at 789.

[6] Id. at 789-90.

[7] Id. at 790.

of record, the State returned to the trial court and sought conviction on the alternative charge of second degree possession of a stolen access device.[8] The court found the defendant guilty and entered written findings of fact and conclusions of law on that alternative charge.[9]

Pruitt argued that due process guarantees the accused the right to be present at all critical stages of a criminal proceeding and requires notice of all court proceedings to the defendant and counsel of record.[10] This court concluded that the failure to notify the defendant and his appellate counsel of the second bench trial and to offer him the opportunity to be present was not harmless error, stating "[b]oth the return of the verdict and the presentation of evidence are critical stages of criminal trials."[11] We vacated the written findings and conclusions because they did not merely memorialize the trial court's earlier oral ruling but rather found the defendant guilty on an alternative charge.[12]

Here, the record reflects that trial counsel for R.S. "approved as to form" the State's proposed written findings and conclusions.[13] But it is undisputed that the State neither gave notice of presentation of the proposed findings and

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[8] Id. at 791.

[9] Id. at 793-94.

[10] Id. at 792.

[11] Id. at 798 (internal citations omitted).

[12] Id. at 799.

[13] Clerk's Papers at 33-36.

conclusions to appellate counsel of record nor provided appellate counsel with copies of the proposal before the trial court entered its written findings and conclusions. Thus, there was no opportunity for appellate counsel to choose whether to participate. We presume that the State also failed to inform the trial judge that appellate counsel of record had not been given notice of presentation of the findings and conclusions.

The requirement of notice to appellate counsel of record is not a mere formality. Moreover, the requirement is not limited to the more complex set of circumstances described in Pruitt. Whether, as here, we are dealing with the very serious matter of imposition of a manifest injustice disposition or with some other matter, the State should give appellate counsel of record notice of presentation of proposed findings and conclusions and copies of the proposal. Only then can appellate counsel decide whether to participate.

The State failed in its obligation to provide notice in this case. In response, R.S.'s counsel of record argues that one of the written findings is not supported by the record. Counsel also argues that these late findings and conclusions do not make clear whether the judge would impose a manifest injustice disposition based solely on proper aggravating factors. We need not rule on the validity of these arguments. Rather, based on the State's failure to provide notice of presentation of the proposed findings and conclusions to appellate counsel of record together with a copy of the proposal, we exercise our discretion and vacate the juvenile court's written findings and conclusions dated

October 29, 2009. We do not consider those findings and conclusions for purposes of our review.

MANIFEST INJUSTICE DISPOSITION

R.S. next argues that the juvenile court improperly relied on uncharged offenses and his good behavior in detention as aggravating factors. He also claims that the court failed to consider two statutory mitigating factors in imposing a manifest injustice disposition. We hold that the manifest injustice disposition is supported by proper aggravating factors and that the court considered the mitigating factors. Remand for a new disposition hearing is not required in this case.

The juvenile court may impose a disposition outside the standard range if it "concludes, and enters reasons for its conclusion, that disposition within the standard range would effectuate a manifest injustice."[14] "'Manifest injustice' means a disposition that . . . would impose a serious, and clear danger to society in light of the purposes of [the Juvenile Justice Act of 1977]."[15]

Both statutory and non-statutory aggravating factors may support a manifest injustice disposition.[16] Lack of family control is a recognized non-

[14] RCW 13.40.160(2).

[15] RCW 13.40.020(17).

[16] State v. Rhodes, 92 Wn.2d 755, 759, 600 P.2d 1264 (1979) ("[T]he court is not limited to consideration of [the statutory] factors."), overruled on other grounds, State v. Baldwin, 150 Wn.2d 448, 78 P.3d 1005 (2003).

statutory factor that may support a manifest injustice disposition.[17]

To uphold a manifest injustice disposition, we must decide that (1) the reasons supplied by the disposition judge are supported by the record; (2) those reasons clearly and convincingly support the conclusion that a disposition within the standard range would constitute a manifest injustice, and (3) the sentence imposed was neither clearly excessive nor clearly too lenient.[18]

This standard of review amounts to a three-part test.[19] First, the juvenile court's findings from the disposition hearing are reviewed under a "clearly erroneous" standard.[20] Findings are "clearly erroneous" only if they are not supported by substantial evidence.[21] Evidence is substantial if it is "sufficient to persuade a fair-minded, rational person of the finding's truth."[22]

Second, we review whether the juvenile court's findings clearly and convincingly support a manifest injustice disposition.[23] This standard is

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[17] State v. T.E.C., 122 Wn. App. 9, 21, 92 P.3d 263 (2004) (citing State v. S.S., 67 Wn. App. 800, 817, 840 P.2d 891 (1992)).

[18] RCW 13.40.230(2); State v. M.L., 134 Wn.2d 657, 660, 952 P.2d 187 (1998).

[19] State v. P., 37 Wn. App. 773, 776-77, 686 P.2d 488 (1984) (citing Rhodes, 92 Wn.2d at 760).

[20] State v. S.H., 75 Wn. App. 1, 9, 877 P.2d 205 (1994), review denied, 125 Wn.2d 1016 (1995), overruled on other grounds by, State v. Sledge, 83 Wn. App. 639, 922 P.2d 832 (1996).

[21] Id.

[22] State v. Meade, 129 Wn. App. 918, 922, 120 P.3d 975 (2005).

equivalent to the criminal standard of "beyond a reasonable doubt."[24]

Third, the ultimate length of the sentence is reviewed to determine if the juvenile court abused its discretion by imposing a clearly excessive disposition.[25] "Once the juvenile court has validly decided to depart from a standard-range term, it has broad discretion to determine the length of a manifest injustice disposition."[26] A trial court abuses its discretion if the sentence was imposed on untenable grounds or for untenable reasons.[27]

We may affirm a manifest injustice finding "if one or more of the factors supported by the record clearly and convincingly support the disposition" and there is "no doubt" that the juvenile court would enter the same disposition based solely on the valid aggravating factors.[28]

As R.S. concedes, this court may uphold a manifest injustice disposition in the absence of written findings and conclusions if the oral record is sufficiently clear.[29] As this court stated in State v. E.J.H.,[30]

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[23] State v. P., 37 Wn. App. at 778.

[24] State v. N.B., 127 Wn. App. 776, 779-80, 112 P.3d 579 (2005).

[25] State v. Tauala, 54 Wn. App. 81, 86, 771 P.2d 1188, review denied, 113 Wn.2d 1007 (1989).

[26] State v. N.B., 127 Wn. App. at 782.

[27] State v. B.E.W., 65 Wn. App. 370, 376, 828 P.2d 87 (1992) (citing Tauala, 54 Wn. App. at 86-87).

[28] State v. S.H., 75 Wn. App. at 12.

[29] State v. E.J.H., 65 Wn. App. 771, 775, 830 P.2d 375 (1992).

> Neither the Juvenile Justice Act ("JJA") nor the court rules require entry of written findings in support of a manifest injustice disposition. . . . [T]he absence of written findings does not preclude meaningful appellate review of a manifest injustice disposition. [RCW 13.40.230] authorizes appellate review of the whole record, including the trial court's oral ruling.[31]

During the course of its oral ruling at disposition, the juvenile court identified several aggravating factors in support of the manifest injustice disposition. All are supported by substantial evidence in the record. They include the lack of family control of R.S., his failure to comply with conditions of previous disposition orders, and his high risk to reoffend.

In its oral ruling, the court identified "a number of concerns." An important concern of the court was "the lack of family control and the lack of positive behavior in the community." This is supported by substantial evidence, including the disposition report and the oral remarks of the probation officer at the hearing.

As the probation counselor stated at the hearing, "the lack of parental control and supervision is well documented for definitely the last six years."[32] The lack of parental control was evidenced by the stolen property from numerous burglaries that was in the basement of the house where R.S., his brother, and his father lived. Despite the quantity of stolen property there, the father knew nothing of it: "he didn't go down there, he stayed upstairs and the

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[30] 65 Wn. App. 771, 830 P.2d 375 (1992).

[31] Id. at 774-75.

[32] Report of Proceedings (July 10, 2009) at 16.

boys stayed downstairs." R.S.'s failure to attend school for the last four years, except when he was in detention, further evidenced the lack of control. The father's failure to keep his promise to the probation counselor to attend the disposition hearing for this charge further evidences a lack of family control. The record also reflects that R.S.'s father went to Cambodia for a month, leaving him without any adult supervision.

R.S. also failed to comply with conditions of previous disposition orders, which the disposition report documents. As the disposition court noted, supervision and parole had both been previously attempted without success. R.S.'s juvenile probation officer stated that "[R.S.] has been offered in the past, the diversion, the supervision, the JRA commitment, parole, all of which have been unsuccessful."[33] In addition, she noted that R.S. was charged with possession of a stolen vehicle while he was out on preadjudication conditions for this residential burglary charge. Disposition for the stolen vehicle charge was before the same judge, on the same day, as the disposition that is the subject of this review.

Finally, as the court noted during its oral comments, R.S. is "likely to end up in prison" based on his behavior. We read this determination to be that he is highly likely to reoffend. This is supported by the dispositional report in which the probation counselor noted that a standardized risk assessment used to

[33] Id. at 19.

evaluate juvenile offenders indicates that R.S. is at risk to reoffend.

R.S. does not seriously argue that these aggravating factors are insufficient to support a manifest injustice disposition or that the record lacks substantial evidence to support these factors. Rather, R.S. first contends that the juvenile court improperly relied on uncharged offenses to support its imposition of a manifest injustice disposition. R.S. focuses on the following statement by the juvenile court:

> The court has to also take into account that while both of these charges are serious they are a very pale version of the array of things that have happened. [R.S.'s] home was filled with stolen property, including firearms which of course he's forbidden to have so the standard range substantially understates what is a fair amount of time.[34]

This uncharged conduct is not a proper aggravating factor. As this court held in State v. Melton,[35] the use of uncharged conduct as an aggravating factor violates the presumption of innocence.[36]

But the court in Melton also stated that "[w]here the sentencing judge has given both proper and improper grounds for imposing an exceptional sentence, this court may affirm rather than remand when it is satisfied that the trial court would have imposed the same sentence absent the improper factors."[37]

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[34] Id. at 25.

[35] 63 Wn. App. 63, 71-72, 817 P.2d 413 (1991).

[36] Id.

[37] Id. at 72 n.12 (citing Tauala, 54 Wn. App. at 88; State v. Campas, 59 Wn. App. 561, 567-68, 799 P.2d 744 (1990)).

So long as "one or more factors supported by the record clearly and convincingly support the disposition" and there is "no doubt" that the juvenile court would enter the same disposition based solely on the valid aggravating factors, this court may affirm.[38]

The approach by the Melton court to the question of whether remand is always necessary where some of the reasons for an exceptional sentence are inadequate for such a sentence is consistent with that articulated in State v. Fisher.[39] There, the supreme court affirmed the imposition of a manifest injustice disposition despite the fact that some of the reasons given by the trial court were inadequate.[40] The court concluded that remand was unnecessary because one of the aggravating factors sustained on appeal was "a substantial and compelling reason justifying the sentence."[41] The court noted in a footnote that remand may be necessary in some circumstances, especially if the sentencing judge obviously placed considerable weight on the invalidated factors.[42] That is not the case here.

Our review of this record convinces us that the trial court would impose the same manifest injustice disposition if we remanded this case. The court's

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[38] State v. S.H., 75 Wn. App. at 12.

[39] 108 Wn.2d 419, 739 P.2d 683 (1987).

[40] Id. at 429.

[41] Id.

[42] Id. at 430 n.7.

focus on the undisputed lack of parental control as an "important factor" together with R.S.'s continued delinquent behavior and high risk of reoffense support a purpose of a manifest injustice disposition: preventing a serious and clear danger to society.[43]

R.S. also contends that the juvenile court erred by relying on his prior good behavior at JRA as an aggravating factor. This argument is based on a misreading of the record.

The juvenile court's sole mention of R.S.'s prior behavior in JRA was to note that "he seemed to respond in a satisfactory way while he was there."[44]

Although the juvenile probation counselor did address R.S.'s satisfactory performance at JRA in more detail during her remarks to the court, this was in the context of recommending a disposition in JRA. It was not discussed by the court as an aggravating factor. Nothing in the probation counselor's remarks or in the juvenile court's single remark indicates that R.S.'s good behavior was considered an aggravating factor.

Rather, the court explicitly noted "[R.S.'s] lack of positive behavior in the community," his "inability to get into or stay in a school program," and the fact that he committed the charged burglary within a month of being released from JRA.

R.S. next argues that the juvenile court failed to consider two statutory

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[43] RCW 13.40.020(17).

[44] Report of Proceedings (July 10, 2009) at 25.

mitigating factors in determining whether to impose a standard range disposition or a manifest injustice disposition. We disagree.

Both of the mitigating factors—that the respondent's conduct neither caused nor threatened serious bodily injury and that at least one year passed between his current offense and any prior offense—were expressly stated in the probation officer's disposition report. The probation officer referred to that report in her opening remarks at the hearing. Moreover, defense counsel expressly referred to these factors during his remarks at the disposition hearing.

R.S. essentially argues that the juvenile court judge must expressly state that he or she considered mitigating factors. RCW 13.40.150(3)(h) requires the court to consider whether or not any of the statutory mitigating factors exist. But case law indicates that it is not always necessary for the juvenile court to state that it has considered the mitigating factors.

In State v. N.E.,[45] this court held that where the mitigating factors are addressed in the probation counselor's written disposition report and the trial court has reviewed that report, there is no requirement that the court formally state on the record that it has considered the mitigating factors.[46]

This court reached the same conclusion in State v. Bevins.[47] Discussing N.E., the court rejected the argument that "the court was required to formally

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[45] 70 Wn. App. 602, 854 P.2d 672 (1993).

[46] Id. at 607.

[47] 85 Wn. App. 281, 932 P.2d 190 (1997).

state that it had [considered the mitigating factors] when the record was clear that the court had."[48]

Here, the disposition report discusses the mitigating factors at issue in this case. Counsel for R.S. at the hearing expressly stated the same factors. The probation counselor twice referred to her report during her oral remarks to the court, stating that she assumed the court had read the report. The court did not refute this statement. Moreover, in its oral ruling, the court referred to R.S. becoming a father, information in the report and not mentioned by the counselor during the disposition hearing. This record establishes that the court read the report and considered the mitigating factors. There was no error in this respect.

Despite the clear case law, R.S. argues that this court should reexamine its interpretation of the word "consider" in the context of RCW 13.40.150(3)(h). In view of the controlling law, we decline to do so.

R.S. does not appear to dispute on appeal the length of the manifest injustice disposition. In any event, we are convinced, both by the rationale for the length of the disposition set forth in the disposition report and the judge's questions about the length during the hearing, that the court properly exercised its discretion as to the length of the disposition. We do not doubt that the court would impose the same disposition if we remanded this matter.

We affirm the order of disposition and vacate the written findings and

[48] Id. at 284.

conclusions that were entered without notice to appellate counsel of record.

Cox, J.

WE CONCUR:

Ellington, J.

Becker, J.